(2)

No. 96-1614

FILED

MAY 14 1997

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM 1996

LORRAINE LODER,

Petitioner

v.

CITY OF GLENDALE, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

---

RESPONDENT'S BRIEF IN OPPOSITION

SCOTT H. HOWARD
City Attorney
RON R. BRADEN
Senior Assistant City Attorney
613 East Broadway
Suite 220
Glendale, CA 91206
(818) 548-2080

CHARLES ROTHFELD*
GARY A. WINTERS
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0616

* *Counsel of Record*

21PP

QUESTION PRESENTED

Whether, in the particular circumstances of this case, a drug testing program that applies to applicants for municipal employment is consistent with the Fourth Amendment.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii
THE PETITION SHOULD BE DENIED 7
CONCLUSION 16

TABLE OF AUTHORITIES

Pages

Cases

Asarco, Inc. v. *Kadish*, 490 U.S. 605 (1989) 7

Chandler v. *Miller*, No. 96-126 (Apr. 15, 1997) .. 8, 9, 12, 15

Dimeo v. *Griffin*, 943 F.2d 679 (7th Cir. 1991) 14

Frothingham v. *Mellon*, 262 U.S. 447 (1923) 7

Georgia Ass'n of Educators v. *Harris*, 749 F. Supp. 1110 (N.D. Ga. 1990) 14, 15

Harmon v. *Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), cert. denied, 493 U.S. 1056 (1990) 14

Katz v. *United States*, 389 U.S. 347 (1967) 11

NTEU v. *Hallett*, 776 F. Supp. 680 (E.D.N.Y. 1991) 14

Piroglu v. *Coleman*, 25 F.3d 1098 (D.C. Cir. 1994) 14

Rutherford v. *Albuquerque*, 77 F.3d 1258 (10th Cir. 1996) 14

Skinner v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) 4, 6, 8-10

Stigile v. *Clinton*, 1997 U.S. App. LEXIS 7135 (D.C. Cir. Apr. 15, 1997) 14

Treasury Employees v. *Von Raab*, 489 U.S. 656 (1989) 4, 8-12

United States v. *Edwards*, 498 F.2d 496 (2d Cir. 1974) ... 13

Vernonia School Dist. 47J v. *Acton*, 115 S. Ct. 2386 (1995) 4, 8-13

Willner v. *Thornburgh*, 928 F.2d 1185 (D.C. Cir.), cert. denied, 502 U.S. 1020 (1991) 10-15

TABLE OF AUTHORITIES — Continued

Pages

Statutes

42 U.S.C. § 12000 *et seq.* 5

42 U.S.C. § 12112(d)(2) 5

42 U.S.C. § 12112(d)(3) 5

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT

1. This case involves a constitutional challenge to a drug testing program implemented by the City of Glendale ("the City") in 1986. For at least 10 years prior to adoption of the program, the City had required every municipal job applicant who had been conditionally approved for hiring or promotion to undergo a medical examination conducted at the offices of a City-designated physician. As a part of this examination, applicants had been directed to submit a urine sample for analysis. Pet. App. B4. Such pre-employment physical exams are common practice among public employers in southern California (RT 128:6-9); the constitutionality of Glendale's pre-employment medical examination requirement has not been challenged by petitioner in this case. See Pet. App. B57-B58.

From 1983 to 1985, the City observed mounting evidence of drug use by municipal employees; the percentage of disciplinary actions involving City employees in which drugs were a factor increased, as did the number of employees who voluntarily sought treatment for substance abuse. Pet. App. B3. The City responded in November 1985 by initiating a two-month pilot project that conducted drug tests on all applicants for City employment. More than 20% of applicants screened during this project tested positive for illegal drug use.[1] The City accordingly added a drug and alcohol screening component to the already required preemployment medical examination. *Id.* at B3-B4.[2]

---

[1] Petitioner therefore is simply incorrect in asserting that the City had "no evidence of a substantial substance abuse problem in its work force" when it implemented the program. Pet. 4.

[2] The three labor associations that represent non-management City employees — the Glendale Police Officers Association, the Glendale Firefighters Association, and the General Employees Association — agreed to the drug testing program as it applied to applicants both for

As the drug screening process was described by the court below,

> [a]pplicants for employment or promotion are notified in the city's employment bulletin (which announces job openings) that, as part of the selection process, a medical examination, including drug and alcohol screening, is required of all applicants. After an applicant has completed the initial, substantive portion of the application process * * * and has been selected by the city for employment or promotion, the applicant is notified that his or her hiring or promotion is conditioned upon successful completion of a preplacement medical examination that includes a drug and alcohol screening component.

Pet. App. B4-B5. The screening is conducted at a physician's office, where the applicant is "asked by a medical employee to sign a written form, consenting to a medical examination and to drug and alcohol testing, and authorizing the release of the test results to the city." *Id.* at B5. The applicant also is asked to list drugs or medications that he or she is taking, and is informed that a positive result on the test, absent a valid explanation for the presence of drugs or alcohol, will result in disqualification from the hiring or promotion process. *Ibid.*

The applicant then produces a urine sample at the physician's office. To prevent fraud or adulteration, "a medical employee accompanies the applicant to a restroom and stands in a cubicle next to the applicant's cubicle while the applicant provides a urine sample; the medical employee does not visually observe the urination process." Pet. App. B6. The applicant then completes the medical examination, which typically includes the taking of a complete medical history, a general physical examination, audiometric testing, and a tuberculosis skin test. *Id.* at B7. The urine sample, meanwhile, is sealed and sent to a certified testing laboratory, where it is assigned a serial

---

employment and for promotion. RT 145:14-146:10, 148:11-13.

number to avoid identifying the applicant by name. *Ibid.* The sample is tested for specified illegal substances and for alcohol. *Id.* at B7-B8.

The test results, which are sent to the physician designated by the City, are treated as confidential and kept in a confidential medical file. Pet. App. B8. If the results are positive, the physician determines whether the applicant has a legitimate medical explanation.[3] In the absence of such an explanation, the applicant is disqualified for hiring or promotion and remains ineligible for the period during which the "eligibility list" for the job is in force. *Ibid.* While promotional applicants who are disqualified are referred to an assistance program, the test results are not provided to any law enforcement agency. *Ibid.*

2. Petitioner, a municipal taxpayer, brought this suit in California superior court to challenge the expenditure of public funds on the drug testing program. See Pet. App. B9. Without distinguishing between applicants for employment and applicants for promotion, that court held that the program was constitutional as applied to applicants in the vast majority of job categories, but was invalid as to positions in the remaining categories. *Id.* at E1-E21; see *id.* at B10-B11.[4] Both sides appealed. The court of appeal concluded that a suspicionless

---

[3] The petition thus is misleading when it asserts that the program "mandates job disqualification for substances which adults may use without regulation * * * or with a prescription." Pet. 3. Lawful use of particular substances (by a doctor's prescription, for example) does *not* result in disqualification.

[4] "Thus, for example, the trial court found the drug testing program constitutionally invalid as applied to city attorneys and their secretaries, library and city clerk personnel, clerks and stenographers, meter readers, and finance and administrative services personnel, but valid as applied to police, fire, and jail personnel, waste management and sanitation workers, health service personnel, mechanics and repair workers, and power and water department personnel." Pet. App. B11.

drug testing program is valid "only as to positions in which the regular duties involve some special and obvious physical or ethical demand, and the compromise of the employee's ability to meet such demands could have an immediate disastrous consequence upon public safety or security." *Id.* at D28. Applying this rigorous standard, the court of appeal held that the City failed to make a sufficiently compelling showing to justify testing in many of the job categories as to which the trial court had permitted screening. See *id.* at D1-D36.

The California Supreme Court reversed in part, holding, insofar as is relevant here, that the City's drug testing program is constitutional as applied to new applicants for employment.[5] Pet. App. B1-B150. After closely reviewing this Court's decisions in *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), *Treasury Employees* v. *Von Raab*, 489 U.S. 656 (1989), and *Vernonia School Dist. 47J* v. *Acton*, 115 S. Ct. 2386 (1995) (see Pet. App. B26-B43), the court below concluded that "in some circumstances, a governmental entity may, consistent with the Fourth Amendment and without obtaining a warrant, require individuals to undergo urinalysis testing even though the government has no basis for suspecting that the individual currently is using drugs." *Id.* at B43. In particular, the court held that "when, as in the case before us,

---

[5] At the same time, the court found the program unconstitutional insofar as it required testing of all *current* City employees who had been approved for *promotion* to new positions. Pet. App. B45-B51. The court held that "the reasonableness of such testing turns upon the nature and duties of the position in question." *Id.* at B50. The court therefore "set aside the city's suspicionless urinalysis testing program [for promoted employees] as overbroad, leaving the city free to fashion a new prepromotional drug testing program in light of current constitutional and statutory authority." *Id.* at B82. This aspect of the holding below is the subject of Glendale's conditional cross-petition for certiorari, which was filed simultaneously with this brief. In addition, the California Supreme Court rejected various state law challenges to the drug testing program. *Id.* at B14-B25, B62-B80.

the drug screening program is administered in a reasonable fashion as part of a lawful preemployment medical examination that is required of each job applicant, drug testing of all job applicants is constitutionally permissible under the Fourth Amendment." *Id.* at B52 (emphasis in original).

Looking first at "the interest supporting suspicionless drug testing of all job applicants," the court noted "the well documented problems that are associated with the abuse of drugs and alcohol by employees." Pet. App. B53. Turning next to "the degree of the intrusion on reasonable expectations of privacy imposed by the city's drug testing program," the court found that "the intrusion on privacy is significantly diminished because the drug testing urinalysis in this case was administered as part of a preemployment medical examination that the job applicant, in any event, would have been required to undergo." *Id.* at B55. The court added that

> [p]laintiff in this case * * * has not contended that the city's examination procedure is unlawful insofar as it requires all job applicants who have been offered employment to submit to a medical examination as a condition of their hiring, and plaintiff has not cited, and our independent research has not revealed, any authority suggesting it is impermissible for an employer to require all job applicants to submit to medical examinations without regard to the nature of the position in question.

Id. at B57-B58.[6]

---

[6] The court found support for this conclusion in the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12000 *et seq.*, which provides that an employer who has made a conditional offer of employment may require the applicant to undergo a medical examination so long as all entering employees are treated alike in this regard. Pet. App. B58, citing 42 U.S.C. § 12112(d)(2), 12112(d)(3). The court concluded that the ADA "accurately reflect[s] the general societal understanding that a requirement that all job applicants

The court therefore held that

> [i]n balancing an employer's interest in suspicionless drug testing in this context against the intrusion on a job applicant's reasonable expectation of privacy, we conclude that the city's urinalysis drug testing of job applicants, administered as part of a lawful preemployment medical examination, is "reasonable" within the meaning of the Fourth Amendment. We believe that this is one of the "limited circumstances," referred to in *Skinner*, "where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion ...."

Pet. App. B61, quoting *Skinner*, 489 U.S. at 624.

Justices Mosk and Kennard dissented from this holding. Pet. App. B85-B121. Justice Mosk was of the view that the intrusion on privacy was not minor, finding that "whatever physical examination had been done prior to the institution of drug testing did not compel disclosure of all the medications the applicant was taking, nor administer tests that would reveal the presence of such medication"; he added that "urinalysis prior to the institution of the drug testing program did not involve the monitoring of urination, aurally or otherwise." *Id.* at B89, B90. He also reasoned that the "general interest in government 'efficiency'" must be viewed with "considerable skepticism" as a basis for drug testing. *Id.* at B97. He concluded that the City "has failed to demonstrate that universal preemployment testing is necessary for the significant improvement of employee efficiency, or for the furtherance of any other substantial government interest." *Id.* at B109. For her part, Justice Kennard found the program "both overinclusive and underinclusive: overinclusive because some capable and

---

submit to a medical examination prior to hiring does not violate a job applicant's reasonable expectation of privacy." *Id.* at B60.

productive workers will, if a trace of an illicit substance is found, fail the test; and underinclusive because some prospective employees will, simply by temporarily abstaining from using illicit substances, be able to pass the test." *Id.* at B119.

THE PETITION SHOULD BE DENIED

Before turning to the substance of the petition, it is plain that certiorari should be denied because petitioner lacks standing to advance her Fourth Amendment claim in this Court. There is no doubt that federal or state taxpayers in petitioner's situation would lack standing to invoke the jurisdiction of a federal court. See *Asarco, Inc.* v. *Kadish*, 490 U.S. 605, 612-620 (1989) (opinion of Kennedy, J.). To be sure, the Court, citing very old authority, has left open the possibility that "the same conclusion may not hold for municipal taxpayers, if it has been shown that the 'peculiar relation of the corporate taxpayer to the [municipal] corporation' makes the taxpayer's interest in the application of municipal revenues 'direct and immediate.'" *Id.* at 613, quoting *Frothingham* v. *Mellon*, 262 U.S. 447, 486-487 (1923) (brackets in original). But even if this remains the law,[7] petitioner here has not made any such showing of a "peculiar relation" that would justify standing in this case. Nor could she: she simply seeks to assert the individual Fourth Amendment rights of third parties. She has no "direct and immediate" interest in that claim.

If petitioner did have standing, however, review would in any event be inappropriate because the decision below involves an unexceptional application of settled principles. The

---

[7] This doctrine was premised on the view that the "relation of the corporate taxpayer to the [municipal] corporation[] * * * is not without some resemblance to that subsisting between stockholder and private corporation." *Frothingham*, 262 U.S. at 487. But it is not at all clear that this legal fiction continues to serve as a basis for standing.

California Supreme Court exhaustively analyzed this Court's relevant Fourth Amendment precedents and properly applied the Court's holdings to the record in this case. There is, moreover, no confusion among the lower courts on the issue presented here; petitioner has not pointed to a conflict among the circuits or state courts on the question, and we are aware of none. At the same time, the Glendale program's impact on privacy is insubstantial: even if not dispositive of standing, it is revealing that the challenge in this case was brought, not by an applicant actually subject to drug testing, but by a disgruntled municipal taxpayer. In these circumstances, review of the essentially fact-bound question presented by the petition is unwarranted.

1. The decision below is consistent with this Court's holdings. The centerpiece of petitioner's claim is the argument that the California Supreme Court's holding is inconsistent with this Court's decisions; petitioner maintains that, under those decisions, a drug test may be required only when "safety or critical confidential information is at risk." Pet. 11. But this assertion is plainly wrong. The ruling below can hardly conflict with this Court's holdings when the three decisions cited by petitioner — *Skinner*, *Von Raab*, and *Vernonia* (see *id.* at 8-11) — each *upheld* the testing program there at issue. And whatever the facts of those cases, the Court never has indicated that drug testing must be limited to applicants for positions where public safety is at issue. To the contrary, the Court has expressly eschewed rigid rules in this area, holding repeatedly that the propriety of a given program must turn on "a context-specific inquiry." *Chandler* v. *Miller*, No. 96-126 (Apr. 15, 1997), slip op. 7.

In fact, the approach mandated by the Court in cases like this one is clear. "Where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interest to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." *Von Raab*,

489 U.S. at 665-666. As a consequence, courts must "examin[e] closely the competing private and public interests advanced by the parties." *Chandler*, slip op. 7. See *Vernonia*, 115 S. Ct. at 2390; *Skinner*, 489 U.S. at 624. And here, that balance — as well as "the 'operational realities of the workplace'" (*Van Raab*, 489 U.S. at 671) — make plain the reasonableness of the Glendale program.

a. The first factor to be considered in the Fourth Amendment inquiry "is the nature of the privacy interest upon which the search here at issue intrudes." *Vernonia*, 115 S. Ct. at 2391. One way in which a drug testing program may affect such an interest, of course, is its requirement that a urine sample be produced; in this regard, "the degree of intrusion depends upon the manner in which production of the urine sample is monitored." *Id.* at 2393. And this Court *already* has held that programs such as the one here have only a minimal impact on privacy. Indeed, the program challenged in *Vernonia* was considerably *more* intrusive than the one at issue in this case; there, many test subjects were visually observed producing the urine sample in conditions "nearly identical to those typically encountered in public restrooms." *Ibid*; see *id.* at 2389. The Court nevertheless indicated that "the privacy interests compromised by the process of obtaining the urine sample are * * * negligible." *Id.* at 2393. See also *Von Raab*, 489 U.S. at 672 n.2. That conclusion surely applies in this case, where the samples are produced in a physician's office and production is not visually monitored.

In addition, any intrusion on privacy worked by the Glendale program is minimized by circumstances surrounding collection of the urine sample. Applicants for employment by the City already are required to submit to a complete medical examination (including the submission of a urine sample) — a requirement that has not been challenged by petitioner (see Pet. App. B57-B58) and that accordingly must be accepted as constitutional for present purposes. And as this Court has noted on several occasions, individuals who are required to undergo

such physical examinations have "diminish[ed] * * * expectations of privacy in respect of a urinalysis test." *Von Raab*, 489 U.S. at 677. See *Vernonia*, 115 S. Ct. at 2393-2394 n.2.

"The other privacy invasive aspect of urinalysis is, of course, the information it discloses concerning the state of the subject's body, and the materials he has ingested." *Vernonia*. 115 S. Ct at 2393. Again, however, the Court already has indicated that, in circumstances like those here, the impact of such a search on privacy interests is "not significant." *Id.* at 2394. See also *Skinner*, 489 U.S. at 626 n.7.

> [T]he tests at issue here look only for drugs, and not for whether the [applicant] is, for example, epileptic, pregnant, or diabetic. * * * Moreover, the drugs for which the samples are screened are standard, and do not vary according to the identity of the [applicant]. And finally, the results of the tests are disclosed only to a limited class of [government] personnel who have a need to know; and they are not turned over to law enforcement authorities * * * .

Vernonia, 115 S. Ct. at 2393 (footnote omitted). Such an analysis does not have a substantial impact on privacy—particularly where, as here, "the disclosure [of test results goes] only to the medical personnel taking the sample, and the Government personnel analyzing it," and not "to persons who personally *know* the [applicant]." *Id.* at 2394 (emphasis in original). By the same token, drug screening has only a small, incremental effect on the privacy interests of persons who already are required to submit to a medical examination and provide their medical histories. See generally *Willner* v. *Thornburgh*, 928 F.2d 1185, 1189 (D.C. Cir.), cert. denied, 502 U.S. 1020 (1991).

Other considerations also significantly diminish privacy interests here. Applicants for municipal employment "voluntarily subject themselves to a degree of regulation" higher than that applicable to the general public, and therefore "have

reason to expect intrusions upon normal rights and privileges, including privacy." *Vernonia*, 115 S. Ct. at 2393. See *id.* at 2397 (Ginsburg, J., concurring). Indeed, as Judge Randolph wrote for the District of Columbia Circuit in a case very similar to this one,

> it is significant that the individual has a large measure of control over whether he or she will be subject to urine testing. No one is compelled to seek a job at [the City of Glendale]. * * * If individuals view drug testing as an indignity to be avoided, they need only refrain from applying.

Willner, 928 F.2d at 1190.

Similarly, "applicants know at the outset that a drug test is a requirement of those positions. [They] are also notified in advance of the scheduled sample collection, thus reducing to a minimum any 'unsettling show of authority,' * * * that may be associated with unexpected intrusions on privacy." *Von Raab*, 489 U.S. at 672 n.2 (citation omitted). This "provision of advance notice" contributes "significantly to diminish the program's intrusion on privacy." *Id.* at 676-677 n.4. See *Willner*, 928 F.2d at 1189.

Finally, "[c]ommon practice, in the government and in the private sector, is also a measure of the degree of privacy job applicants reasonably can expect." *Willner*, 928 F.2d at 1191. And it is undisputable that "drug-testing programs have become fairly common in the nation's largest firms." *Ibid.* See *id.* at 1191-1192 (citing authority). This gives "some indication of what expectations of privacy 'society is prepared to accept as "reasonable"' when the government engages in the hiring process." *Id.* at 1192, quoting *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

b. On the other side of the equation, a court must consider the governmental interest that underlies the search. While petitioner insists that there must be a "direct relationship

between the specific job requirements and the drug test" (Pet. 11), the Court in fact has rejected the argument that the Fourth Amendment demands a "fixed, minimum quantum of governmental concern, so that one can dispose of a case by answering in isolation the question: Is there a compelling state interest here? Rather, the phrase describes an interest which appears *important enough* to justify the particular search at hand." *Vernonia*, 115 S. Ct. at 2394-2395 (emphasis in original). As a consequence, "[d]ecreasing levels of intrusiveness require decreasing levels of justification." *Willner*, 928 F.2d at 1188.

Here, the City's interest in drug testing is a powerful one. As an initial matter, the City had solid empirical evidence of drug use by its employees and job applicants. And "[a] demonstrated problem of drug abuse" plainly "bolster[s] the * * * argument that drug-testing programs were warranted and appropriate." *Chandler*, slip op. 13. Compare *Von Raab*, 489 U.S. at 680 (Scalia, J., dissenting).[8]

These empirical data are significant because an employer has substantial and legitimate reasons for preventing drug use by employees. As the court below noted, the problems associated with the use of drugs and alcohol by employees are "well documented," including "increased absenteeism, diminished productivity, greater health costs, increased safety problems and potential liability to third parties, and more frequent turnover." Pet. App. B53. See *id.* at B53-B54 n.14 (citing authority); *Willner*, 928 F.2d at 1192-1193. That observation was grounded on the record here and, indeed, is conceded by petitioner. See Pet. 6 n.5. In addition, an employer "makes a considerable investment in terms of time

---

[8] Petitioner evidently is of the view that suspected drug use provides no support for a screening program. See Pet. 4. In *Vernonia*, however, the Court found relevant injuries that were "belie[ved]" to be attributable to drug use. 115 S. Ct. at 2389.

and money whenever it hires someone," so that "[f]or economic reasons alone, the [employer] is therefore entitled to compile pertinent information about those who seek positions with it." *Willner*, 928 F.2d at 1192.

While screening out applicants who abuse drugs or alcohol therefore is a significant governmental interest, doing so is virtually impossible in the absence of drug testing. As the court below noted, "[w]hen deciding whether to hire a job applicant * * * an employer has [no] opportunity to observe the applicant over a period of time." Pet. App B55. "Background checks and information supplied by the applicant assist the government in making what can, at best, be only a prediction about the individual. The fact remains that the applicant is a person the government, as prospective employer, has had no opportunity to observe in the setting of the workplace." *Willner*, 928 F.2d at 1193. In these circumstances, there can be no doubt that the "intrusion upon privacy is one that a reasonable employer might engage in." *Vernonia*, 115 S. Ct. at 2397.

c. Given these considerations, the Glendale program's impact on privacy is minimal. The program is designed to be physically unintrusive and to safeguard confidentiality. It is a small part of a much more comprehensive examination. No one is forced to submit to a test; a search "is avoidable 'by choosing not to [seek municipal employment].'" *Vernonia*, 115 S. Ct. at 2397 (Ginsburg, J., concurring), quoting *United States* v. *Edwards*, 498 F.2d 496, 500 (2d Cir, 1974) (Friendly, J.). The program is necessary to advance a very important governmental interest. And as we have noted, in the years since the program was initiated, it has not been challenged by a single applicant subject to drug or alcohol screening. Such a program is fully consistent with this Court's precedents.

2. There is no confusion in the lower courts on the issue presented here. Petitioner also is incorrect in asserting (at Pet. 11-13) that the holding below conflicts with the decisions of other courts. We are not aware of *any* appellate

decision, state or federal, invalidating a program like the one in this case. To the contrary, *Willner* appears to be the only reported appellate holding (other than the one below) involving a challenge to a program that screens all *applicants* for employment; there, the Federal Government required applicants for positions at the Department of Justice to take drug tests.[9] That program, which was virtually identical to the one here, was *upheld* by the District of Columbia Circuit.[10] Given the infrequency with which the issue arises and the lack of disagreement among the lower courts, petitioner has failed to demonstrate a need for further review.[11]

---

[9] While petitioner asserts (at Pet. 12) that *Willner* "focus[ed] on testing for high level Justice Department jobs," the program there at issue actually requires "*all* persons tentatively selected for employment in the Department's Offices, Boards and Divisions to provide a urine sample for testing." 928 F.2d at 1187 (emphasis added).

[10] *Willner* has since repeatedly been cited with approval both by the D.C. Circuit and by other courts. See, *e.g.*, *Stigile* v. *Clinton*, 1997 U.S. App. LEXIS 7135 (D.C. Cir. Apr. 15, 1997), at * 6; *Rutherford* v. *Albuquerque*, 77 F.3d 1258, 1262 (10th Cir. 1996); *Piroglu* v. *Coleman*, 25 F.3d 1098, 1103 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 1093 (1995); *Dimeo* v. *Griffin*, 943 F.2d 679, 681 (7th Cir. 1991); *NTEU* v. *Hallett*, 776 F. Supp. 680, 695 (E.D.N.Y. 1991).

[11] The decisions cited by petitioner (at Pet. 12-13) as invalidating drug testing programs are inapposite here. The only appellate decision mentioned by petitioner, *Harmon* v. *Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), cert. denied, 493 U.S. 1056 (1990), involved *random* drug testing of *incumbent* Justice Department employees; the case was specifically distinguished by the D.C. Circuit in *Willner*. See 928 F.2d at 1189, 1192. Similarly, *NTEU* v. *Watkins*, 722 F. Supp. 766 (D.D.C. 1989), involved random testing of incumbent employees. And in *Georgia Ass'n of Educators* v. *Harris*, 749 F. Supp. 1110, 1114 (N.D. Ga. 1990), the State "failed to specifically identify any governmental interest" served by drug testing other than the "generalized governmental interest in maintaining a drug-free

It may be added that there also is no need for this case to be reconsidered in light of the Court's recent decision in *Chandler*, which invalidated Georgia's program requiring drug testing of candidates for designated political offices. In reaching that holding, the Court on several occasions emphasized "the absence of any record of drug abuse by elected officials in Georgia." Slip op. 4. See *id.* at 12 ("[n]otably lacking in [the State's] presentation is any indication of a concrete danger"); *ibid.* ("[n]othing in the record demonstrates that the hazards [the State] broadly describe[s] are real"); *id.* at 15 ("Georgia asserts no evidence of a drug problem among the State's elected officials"). Yet here, of course, there *is* evidence of a real problem in the record. In *Chandler*, moreover, the Court found it "telling" that there was little need for drug testing because "[c]andidates for public office * * * are subject to relentless scrutiny — by their peers, the public, and the press. Their day-to-day conduct attracts attention notably beyond the norm in ordinary work environments." *Id.* at 15. But that is *not* the case here; the City "has had no opportunity to observe [applicants] in the setting of the workplace." *Willner*, 928 F.2d at 1193. As a consequence, the drug test in *Chandler* was essentially "symbolic." Slip op. 15; see *id.* at 16. Again, that manifestly is *not* true of Glendale's program, which is aimed at the concrete harms caused by employee drug and alcohol abuse.

Finally, the Court in *Chandler* expressly noted that "Georgia's singular drug test for candidates is not part of a medical examination designed to provide certification of a candidate's general health"; the Court "express[ed] no opinion on such examinations." Slip op. 16-17. Glendale's program, in contrast, *is* part of such a broader examination — and that consideration was central to the holding below. It accordingly

---

workplace"; here, in contrast, the City demonstrated the particular harms caused by employees' use of drugs. In addition, there is no indication in *Georgia Ass'n* that the State made any empirical showing of drug abuse by applicants for employment.

seems clear that reconsideration of this case in light of *Chandler* would give the California Supreme Court no reason to alter its judgment. In these circumstances, the decision below should not be disturbed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SCOTT H. HOWARD
City Attorney
RON R. BRADEN
Senior Assistant City Attorney
613 East Broadway
Suite 220
Glendale, CA 91206
(818) 548-2080

CHARLES ROTHFELD*
GARY A. WINTERS
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0616

* *Counsel of Record*

MAY 1997